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August 29, 2013

Ms. Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, NW
Washington, DC 20573-0001
Phone: (202) 523-5725
Email: secretary@fmc.gov

Re: Docket No. 13-05, Comments on Ocean Transportation Intermediary Regulation Revisions

Dear Ms. Gregory:

The attached written comments are submitted on behalf of the International AntiCounterfeiting Coalition, Inc. ("IACC"), in response to the request by the Federal Maritime Commission ("FMC"), published in the Federal Register on May 31, 2013, for written submissions from the public concerning the governing the licensing, financial responsibility requirements and duties of Ocean Transportation Intermediaries.

The IACC applauds the FMC for undertaking this important work, and for its ongoing efforts to foster a fair, efficient and reliable international ocean transport system. We look forward to assisting in those efforts, and we are available at any time for clarification of any issues raised in this submission.

A. The IACC

With a membership composed of over 200 corporations, trade associations, and professional firms, and founded over 30 years ago, the IACC is one of the world's oldest and largest organizations representing exclusively the interests of companies concerned with trademark counterfeiting and the related theft of intellectual property. The members of the IACC represent a broad cross-section of industries, and include many of the world's best known companies in the apparel, automotive, consumer goods, entertainment, pharmaceutical, and

other product sectors. The IACC is committed to working with government and industry partners in the United States and abroad to strengthen IP protection by encouraging improvements in the law and the allocation of greater political priority and resources, as well as by raising awareness regarding the range of harms caused by IP violations.

B. Counterfeiting, Identity Theft and the Federal Maritime Commission

The majority of counterfeit and pirated goods, like authorized goods, enter the United States via ocean transportation. This problem has been, and continues to be, addressed in part by the U.S. Bureau of Customs and Border Protection (CBP) through its review and regulation of incoming ocean freight. In 2012 alone CBP reported that it seized counterfeit and infringing cargo valued at between \$700,000,000 and \$800,000,000.¹ CBP's focus, however, is necessarily on the freight itself, or on those who represent what the freight is to CBP (i.e., licensed customs brokers filing entry documents), rather than on the various institutional participants who arrange or participate in the actual transport of the inbound freight, e.g., Ocean Transportation Intermediaries (OTIs). The Federal Maritime Commission (FMC), on the other hand, directly regulates the conduct of and agreements between those entities involved in the ocean transportation of goods in and out of the United States. Given this responsibility, the FMC is uniquely situated to significantly deter the illegal importation of counterfeit and pirated goods through its regulation and licensing of, and investigative activities regarding, OTIs.

Many of the IACC's trademark and copyright owner members have experienced a large and growing incidence of counterfeit and/or pirated shipments being imported into the U.S. that, upon investigation, are found to have been originated with the assistance of OTIs in the United States. In many of these cases, the importers used stolen or fabricated identities that, under current regulations, are not required to be challenged or otherwise verified by OTIs as a precondition to providing transportation services. These transportation services frequently include the retention of a third party customs broker to file entry documents on behalf of the importer. Our members have found that, in such cases, the customs broker usually is retained only upon the condition that it has no direct contact with the importer. This condition is required by OTIs to protect their business relationship with the importer from encroachment by the customs broker. In this manner, the unchallenged and unverified, but stolen or false, identity of the unlawful importer is simply passed along by the OTI to the customs broker, who has agreed not to contact the importer to challenge or verify the stolen or false identity.

Counterfeiters and pirates have exploited the lack of FMC regulations requiring OTIs to verify the identities of importers, as well as the corresponding practice of OTIs retaining third party customs brokers under conditions that prevent customs brokers from also verifying the

¹ See CBP's Intellectual Property Rights, Fiscal Year 2012 Seizure Statistics, http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy2012_final_stats.ctt/fy2012_final_stats.pdf

identities of the importers.

C. Overview of Proposed Regulations

With this dilemma in mind, the IACC appreciates the opportunity to submit the following comments in regards to the amendment of 46 CFR Part 515.

Section 515.2

The IACC first proposes adding language to Section 515.2, concerning basic definitions, to clearly state that the FMC's regulation covers both "inbound" and "outbound" freight. While the IACC recognizes that the FMC has regulated "all" shipping in and out of the United States since its inception, this basic fact is not explicitly clear from the regulations. The IACC's suggested language makes this clear from the outset.

Section 515.23(i)

Intellectual property owners learn about a shipment of counterfeit or infringing goods being imported into the United States only after the shipment is seized or detained by CBP. Once a seizure or detention has occurred, the specific shipment is then prevented from further distribution into commerce in the United States. To this extent, it may be argued that an intellectual property owner has not suffered any readily ascertainable actual damages resulting from the specific shipment that has been stopped.

The reality is, however, that most counterfeit or infringing goods are imported into the United States through a repetitious series of shipments utilizing the same stolen identity or other fraudulent scheme until a counterfeit shipment is finally identified and stopped by CBP. At that point, the individuals involved in the importation of the counterfeit goods cut their losses and move on to their next scheme. Given that the importation of such merchandise is criminal activity, it is the IACC's experience that the only evidence available to show the nature and volume of infringing shipments is the documentation related to these past infringing shipments, which avoided detection by CBP, but utilized similar fraudulent documents and a similar fraudulent scheme for importation as a shipment that was ultimately detained or seized. To this end, the IACC recommends the addition of an evidentiary presumption that where any related shipments utilize the same or similar false documents as a seized or detained shipment, these related shipments are presumed to contain the same type of unlawful or infringing goods for purposes of awarding damages under the Shipping Act.² The IACC further recommends that this

² It is well recognized that counterfeiters and copyright pirates regularly hide or secret documentation and evidence related to size and profit garnered from their infringing behavior. With this in mind both the Copyright Act and Lanham Act provide for statutory damages, rather than only actual damages, in counterfeiting and pirating cases. See 15 U.S.C. §1117(c) and 17 U.S.C. §504(c).

presumption be rebuttable. Specifically, any OTI can rebut the presumption simply by providing sworn testimony from any individual with actual knowledge of the cargo contained in the related shipments. This individual could be the actual shipper, importer of record, ultimate consignee or other individual with specific knowledge of the cargo. One can reasonably presume that if the related shipments did not contain counterfeit or infringing goods, such testimony should be readily obtainable.

515.31(f)

Given that much of the identity theft described above has involved FMC-regulated OTIs³, the IACC recommends adding specific language prohibiting a OTI from passing on false documents of this nature, or documents which a licensee has reason to believe may be fraudulent.

515.31(m)

The IACC's experience with counterfeit shipments imported through an identity theft scheme has shown that it is a common practice among OTIs to pass on shipping documents, POAs or documents necessary to validate POAs, which are on their face fraudulent or are sourced from individuals in a manner that suggests the documents are fraudulent. Additionally, many OTIs inappropriately attempt to protect their client relationships by prohibiting customs brokers from having any direct contact with the principal importer. This effectively prevents customs brokers from fulfilling their own obligation to validate a principal's POA before filing entry documentation. Customs brokers have repeatedly informed IACC members that they view OTIs, rather than the principal importer, as their client. This runs counter to the FMC's regulatory goal of full and transparent service to the principal importer.

To this end, the IACC suggests adding a provision that a FMC-regulated OTI may not pass on a POA to a customs broker from a principal without first validating the source and executer of the POA and its related documentation. Further, the provision would not allow an OTI to prohibit a customs broker from having direct contact with the importer or its representative to ensure that shipping documents, POAs, and POA validating documents are true and that the person authorizing a POA is in fact authorized to execute the document.

515.32(e)

As noted above, intellectual property owners are only made aware of a specific shipment of counterfeit or infringing product when the shipment is detained or seized by CBP. CBP is then required to provide the intellectual property owner with notice of the detention or seizure. See

³ In the course of their investigations, IACC members have uncovered a variety of fraudulent shipping documents, powers of attorney (POAs), and documents necessary to validate POAs to customs brokers. The frequency with which IACC members report encountering these problems has increased in recent years, and will likely continue to do so, absent the adoption of clear guidance from the FMC.

19 CFR § 133.21. This notice, however, does not provide specific information concerning the shipment as it relates to FMC-regulated OTIs. Intellectual property owners' investigations of such importation schemes would be greatly facilitated with the additional knowledge of the identities of the OTIs involved. Such transparency would also act as a disincentive to OTIs from engaging in unlawful activities, as their involvement may subject them to criminal or civil liability under the Lanham Act, Copyright Act, Tariff Act and Shipping Act. Their involvement may also be subject to further FMC regulatory investigation and sanctions.

With this in mind, the IACC proposes language that provides the FMC with regulatory authority to provide an intellectual property owner identified in a 19 CFR § 133.21 notice with relevant shipping information concerning a seized or detained shipment. An intellectual property owner or its authorized representative must make a request to the FMC for such information in writing.

515.33

The IACC recommends adding language to first paragraph of revised section 515.33 that specifically provides that "licensed or registered NVOCCs", like licensed freight forwarders, must retain relevant FMC documentation for five years. In its current form, this requirement is unclear, although the IACC understands that the FMC has enforced the position that "licensed or registered NVOCCs" also have a five-year obligation to retain relevant documentation.

515.33(b)

The IACC recommends that the definition of specific shipping documents that must be retained for five years by FMC-regulated entities be amended to specifically include bills of lading, shipping instructions, arrival notices, import and export declarations, CBP powers of attorney, and any other records related to the importation or exportation of goods with respect to such shipment, as well as all documentation related to the validation of shipping documentation. In this way, FMC-regulated entities would be required to maintain the essential documents related to each shipment as well as those documents upon which they might reasonably rely upon to meet their due diligence standard of care. The duty to retain these specific documents will also act as a disincentive to those involved in illegal activities, as such documentation, if fraudulent, would show inconsistencies that might open the FMC-regulated entity to administrative or civil review and/or liability.

520.2

For consistency, the IACC also recommends that the definition of "OTI" and "NVOCC" in Section 520.2 be amended to match those of the IACC's proposed amendments to Section 515.2.

D. Proposed Regulations

With this as background, and in support of the FMC's proposed amendments, we suggest the following changes. Omitted text is marked in strikethrough; new proposed text is marked in bold.

515.2(h)(2)

Preparing and/or processing **import and/or** export documents, including the required 'electronic **import and/or** export information';

515.2(m)(i)

~~in the United States~~, dispatches shipments from the United States via a common carrier and books or otherwise arranges space **and/or transportation** for those shipments on behalf of shippers; and

515.2(m)(2)

Non-vessel-operating-common carrier (NVOCC) means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier and/or arranges space **and/or transportation for shipments intended for export or import to the United States.**

515.23(i) *Rebuttable presumption of similar goods.* Should an OTI utilize, pass on and/ or create any false document(s) covered by §515.31(e) in furtherance of the transportation, exportation or importation of any shipment containing unlawful or infringing goods, a rebuttable presumption exists that, where any related shipments utilize the same or similar false documents, these shipments contained the same type of unlawful or infringing goods for purposes of awarding damages under the Shipping Act. This presumption may be rebutted by specific and credible sworn documentation and/or testimony showing that the related shipments contained lawful and/or non-infringing goods.

515.31(f)

Errors and omissions of the principal or shipper. A licensee who has reason to believe that its principal or shipper has not, with respect to a shipment to be handled by such licensee, complied with the laws of the United States, or has made any error or misrepresentation in, or omission from, any export declaration, bill of lading, affidavit, **power of attorney, shipping**

instructions, documents obtained in order to properly validate a United States Customs and Border Protection Power of Attorney, or other document which the principal or shipper executes in connection with such shipment, shall advise its principal or shipper promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in any transaction involving such document until the matter is properly and lawfully resolved.

515.31(m)

Validation of power of attorney. No OTI shall accept, pass on, or otherwise communicate a United States Customs and Border Protection Power of Attorney (“Customs POA”) from a principal, or a principal’s agent, to a customs broker without properly validating the Customs POA, i.e., verifying and obtaining documents evidencing that the principal’s purported identity is accurate and that the principal has authority to bind the principal company they purport to represent. No OTI shall prohibit or in any way interfere with a licensed customs broker’s own obligations to validate a Customs POA or otherwise have direct contact with the entity executing a Customs POA.

515.32(e)

Information provided to trademark and copyright owners. Upon written request from a trademark or copyright owner that has been notified by U.S. Customs and Border Protection of the denial of entry and/or detention of an inbound shipment of goods bearing or consisting of unauthorized trademarks or copyrighted works pursuant to 19 CFR §§133.22 and 42, the Commission shall, within 30 days from receipt of a written request, provide to the trademark or copyright owner, or its duly authorized representative, relevant information concerning the transportation of the denied and/or detained shipment, including the container number, bill of lading number(s)(Master and House), carrier name and contact information, and OTI name and contact information, as well as any payment information that is available.

515.33

The last sentence of amended first paragraph should read: “...In addition, each **licensed or registered NVOCC and** each licensed freight forwarder must retain the following documents for a period of five years:”

515.33(b)

Types of services by shipment. A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee,

including each invoice for any service arranged by the licensee and performed by others, **bills of lading, shipping instructions, arrival notices, import and export declarations, United States Customs and Border Protection Powers of Attorney, and any other records related to the importation or exportation of goods**, with respect to such shipment, as well as all documentation related to the validation of such shipping documentation. This documentation shall include any records regarding the contact details of the person or persons directing or paying for the shipment, including his/her name, telephone number, and email address, as well as any payment information, including copies of checks or bank wire information.

520.2

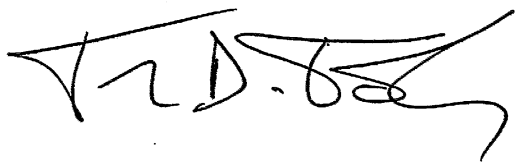
Ocean transportation intermediary means an ocean freight forwarder....

(1)(i) ~~in the United States~~, dispatches shipments from the United States via a common carrier and books or otherwise arranges space **and/or transportation** for those shipments on behalf of shippers; and ...

(2)*Non-vessel-operating-common carrier* (NVOCC) means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier and/or arranges space **and/or transportation for shipments intended for export from or import into the United States.**

We would welcome the opportunity to discuss our experiences further, and to assist in this effort. Please contact me at your convenience via email at: tjohnson@iacc.org or by phone at: 202-223-6667.

Respectfully submitted,



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